Transparency and the 21st Century Utility Commission

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Ohio | Public Utilities Commission

ILLINOIS COMMERCE COMMISSION ICC

Background

"Transparency is a critical function for government"

(Jacksonville, Illinois *Journal-Courier*, April 5, 2018)

> *Government, large and small, exists to serve the people.*
>
> *Why then do so many try to keep the people in the dark about what happens behind closed doors?*
>
> *Certainly there are occasions when negotiations or investigations warrant reasonable delays in disclosing some details. Municipalities need the ability to hammer out contracts with employees and police should have the authority to weigh when the premature release of information would hamper an investigation.*
>
> *The problem is that too many officials are bending those reasonable situations and blurring the line between transparency and subterfuge.*

Freedom of Information Act (FOIA)

History: Federal FOIA enacted on July 4, 1966, despite strong opposition from President Johnson; expanded in 1974, over the veto of President Ford

All 50 states and D.C. have enacted public records laws; judicial interpretations of federal law are generally deemed helpful in construing a state's FOIA law (e.g., Roulette v. Dep't of Central Mgmt. Servs., 141 Ill. App. 3d 394 (1st Dist. 1986))

Purpose of FOIA

"It is a fundamental obligation of government to operate openly and provide public records as expeditiously and efficiently as possible…." (5 ILCS 140/1)

"Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." —*Louis Brandeis*

What is a “public record”?

The definition includes “[A]ll … documentary materials pertaining to the transaction of public business, regardless of the physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, possessed or under the control of any public body.” (5 ILCS 140/2(c))

Preservation of records, paper or electronic: usually governed by another statute—in Illinois, the State Records Act (5 ILCS 160/). The length of time for records retention is generally determined by *content* rather than *format*.

The problem of electronic records: cheap to store, but easy to delete

More on public records

Settlement agreements:

- "All settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of this Act may be redacted." (5 ILCS 140/2.20)
- Generally cannot redact price

Records of "use of public funds" must be disclosed (5 ILCS 140/2.5), including **invoices for outside counsel or other legal services**

Employment contracts—cannot hide them in an exempt "personnel file"

Whose public records?

FOIA requires disclosure by entities “contracted to perform a governmental function” (5 ILCS 140/7(2))

- But see Better Govt. Ass’n v. Illinois High School Ass’n, 2017 IL 121124 (2017) (high school sports association is not a “public body” for purposes of state FOIA)

A public body may be required to extract, but not create data. (Chicago Tribune Company v. Department of Financial & Professional Regulation, 2014 IL App (4th) 13027)

Exemptions from “public record”

Generally construed narrowly. (“Presumption. All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by **clear and convincing** evidence that it is exempt.”
5 ILCS 140/1.2)

A public body must “provide a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing.” (Illinois Educ. Ass’n v. Illinois State Bd. of Educ., 204 Ill. 2d 456, 464 (2003).)

Exercise Caution when Claiming an Exemption

Legal scrutiny

- Review by court or other public officials (Illinois Public Access Counselor)

Public scrutiny

- Do you want to drive a story?

Key Exemptions for State PUCs

Private and Personal Information

- Ill. exemption 7(1)(b): personal financial information, medical records, home phone numbers, personal email addresses, etc.
- Ill. exemption 7(1)(c): “Personal information . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.…”

Attorney-Client Privileged Information (Ill. exemption 7(1)(m))

- May apply to inter-agency communications (exercise caution)
- Who is the client? Is the advice legal in nature?

Key Exemptions (cont'd)

Trade Secret Information (Ill. exemption 7(1)(g))

- Will not apply to pricing information in public contracts.

Critical Infrastructure Information

- Federal law (FAST Act (16 U.S.C. 824o-1); FERC Order No. 833 (defining and protecting critical energy/electric infrastructure (CEII))
- State law (Ill. exemption 7(1)(x)) ("Maps and other records regarding the location or security of generation, transmission, distribution, storage, gathering, treatment, or switching facilities owned by a utility, by a power generator, or by the Illinois Power Agency.")
- State law (Ill. exemption 7.5(s) ("Information the disclosure of which is restricted under Section 5-108 of the Public Utilities Act")

Key Exemptions (cont'd)

Judicial Mental Process Exemption When Acting Quasi-Judicially

- "An administrative officer, sitting in a quasi-judicial capacity and required to reach a conclusion based on evidence presented to him, cannot be called by either party to the proceedings and examined as to the mental processes in arriving at such conclusion." *TBC Westlake, Inc. v. Hamilton Co. Bd. of* Revision, 81 Ohio St.3d 58, 64, 689 N.E.2d 32 (Ohio, 1998)
- Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather v. Ritch*, 195 U.S. 276, 306-07 [25 S.Ct. 58, 67, 49 L.Ed. 193, 214], so the integrity of the administrative process must be equally respected. See *Chicago, B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585, 593 [27 S.Ct. 326, 327, 51 L.Ed. 636, 638].

What Does “Quasi-Judicial Action” Mean?

“Quasi-judicial proceedings” have included, but have not been limited to, the following:

- sworn testimony,
- oath taking,
- presence of traditional parties,
- deliberation of issues raised by parties (exercise of discretion),
- the lack of administrative limitations by another court or agency (such as the requirement to provide notice to other legislative or executive authorities before moving forward with an administrative order),
- notice to the involved parties, and
- the decision may be appealed to the courts.

Quasi-Judicial v. Legislative Actions

The PUCO Acting Quasi-Judicially:

- proceedings include notice, hearing, and the making of an evidentiary record (In *Ohio Domestic Violence Network v. Pub. Utilities Comm.*, 70 Ohio St. 3d 311, 315 (1994)); and
- traditional rate making cases (*Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 638 N.E.2d 550 (1994)).

The PUCO Acting Legislatively:

- rulemakings (*Ohio Edison Co. v. Pub. Util. Comm.*, 63 Ohio St. 3d 555, 566 (1992); and
- alternative regulatory proceedings with notice and comment procedures, absent the PUCO exercising its discretion to hold an evidentiary hearing (*Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 638 N.E.2d 550 (1994)).

Quasi-Judicial v. Legislative Actions

Examples of quasi-judicial actions:

- State Medical Board – allowed to deliberate in private on license cases but must have a public hearing of the evidence and a public vote on the final decision. *Angerman v. Ohio State Med. Bd.*, 70 Ohio App. 3d 346, 352, 591 N.E.2d 3, 7 (1990)
- Watershed District Court – allowed because it was a statutorily created court of common pleas with jurisdiction over a conservancy district and comprised of individual, elected judges. *Walker v. Muskingum Watershed Conservancy Dist.*, 2008 WL 3307126 (Ohio Ct. App. Aug. 7, 2008) (citing *Miami County v. Dayton*, 92 Ohio St. at 215, 110 N.E. 726).
- Township Board of Zoning Appeals – allowed when holding an executive session to deliberate on what conditions could be placed on a zoning variance. *Castle Manufactured Homes v. Tegtmeier*, 1999 Ohio App. LEXIS 4519 (9th Dist., Wayne County, 1999), see also 2000 Ohio Op. Atty. Gen. No. 2000-035 (Ohio A.G.).

Quasi-Judicial Action and Privacy to Deliberate

Can/should an administrative agency, when acting quasi-judicially, deliberate in private?

> "Although the BTA [Board of Tax Appeals] opens its hearings to the public under Ohio Adm. Code 5717–1–15(D), it, like all judicial bodies, requires privacy to deliberate, *i.e.*, to evaluate and resolve, the disputes. This privacy frees the BTA from the open pressure of the litigants as it contemplates the case. Privacy provides an opportunity for candid discussion between board members and staff on the legal issues and the facts so the BTA can reach a sound decision." *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision*, 1998-Ohio-445, 81 Ohio St. 3d 58, 62, 689 N.E.2d 32, 35; See *Nasrallah v. Missouri State Bd. of Chiropractic Examiners* (Nov. 26, 1996), Mo.App. No. WD 51663, unreported, 1996 WL 678640.

Deliberative Process An Executive Privilege

"Deliberative process privilege" permits the government to withhold documents containing confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice. *Com. of Pa. v. Vartan*, 557 Pa. 390, 399, 733 A.2d 1258 (Pa. 1999).

The primary purpose of the deliberative process privilege is to protect the frank exchange of ideas and opinions critical to the government's decision-making processes where disclosure would discourage such discussion in the future. *Vandelay Entertainment, LLC v. Fallin*, 2014 OK 109, 2014 Okla. LEXIS 142, 343 P.3d 1273, ¶21.

States recognizing the privilege include New Jersey, Alaska, Colorado, Nevada, Iowa, Oklahoma, Pennsylvania, and Vermont. New Mexico, Wisconsin, Illinois, Massachusetts, and North Carolina have rejected the deliberative process privilege.

Communications on Personal Devices

Texts/emails conducting official business on personal phones and accounts are almost certainly subject to FOIA

- City of Champaign v. Madigan, 2013 IL App (4th) 120662

What is the obligation to conduct a search of personal phones/accounts?

- Start with the language of the request
- Does your commission have a policy forbidding conduct of official business using text messages or with personal email accounts?
- Determine if the employee has used a personal device/account, even if it is against policy

Open Meetings Act (OMA)

The OMA and statutes like it prohibit certain types of communications among members of a public body itself. The purpose is to ensure that public business is conducted openly.

> See, e.g., 5 ILCS 120/1: “It is the public policy of this State that public bodies exist to aid in the conduct of the people’s business and that the people have a right to be informed as to the conduct of their business.”

For what purposes can a meeting be closed? Can a commission act in closed session?

Inadvertent meetings—e.g., attendance of members at panel discussion

Open Meetings Act (cont'd)

Round-robin or serial meetings –

- isolated one-on-one conversations between individual members of a public body regarding its business, either in person or by telephone, do not violate the Open Meetings Act. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 544 (1996); *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 1st Dist. Nos. C-040578, C-040589, 2005-Ohio-3489, ¶ 11
- may not "circumvent the requirements of the statute by setting up back-to-back meetings of less than a majority of its members, with the same topics of public business discussed at each." 932 *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543 (1996).

Investigation and information-seeking meetings

- gatherings strictly of an investigative and information-seeking nature that do not involve actual discussion or deliberation of public business are not "meetings" for purposes of the Open Meetings Act. [Not affirmed by Ohio Supreme Court]

Open Meetings and the Public

Aside from issues of quorum and physical presence, be alert for public comment requirements.

> See, e.g., 5 ILCS 120/2.06(g): “Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.”

What about statements at a public forum (e.g., Commission meeting)?

- They are not considered to be *ex parte* communications. 5 ILCS 430/5-50(b)
- They cannot be used to resolve disputed factual issues, but may be taken into account for other equitable and policy reasons. (Apple Canyon Lake Property Owners’ Ass’n v. Illinois Commerce Comm’n, 2013 IL App (3d) 100832)

Gift Ban

Long-established statutes and regulatory provisions prohibit gifts to public employees (and also their immediate family members) from a "prohibited source," "interested entity," and the like.

> See, e.g., 220 ILCS 5/2-102 (prohibiting Commission members and employees from soliciting or accepting any "gift, gratuity, emolument or employment" from any person or company "subject to the supervision of the Commission," or from agents or employees of those entities).

Note that these restrictions often are not limited to utilities, and may bar solicitation of employment.

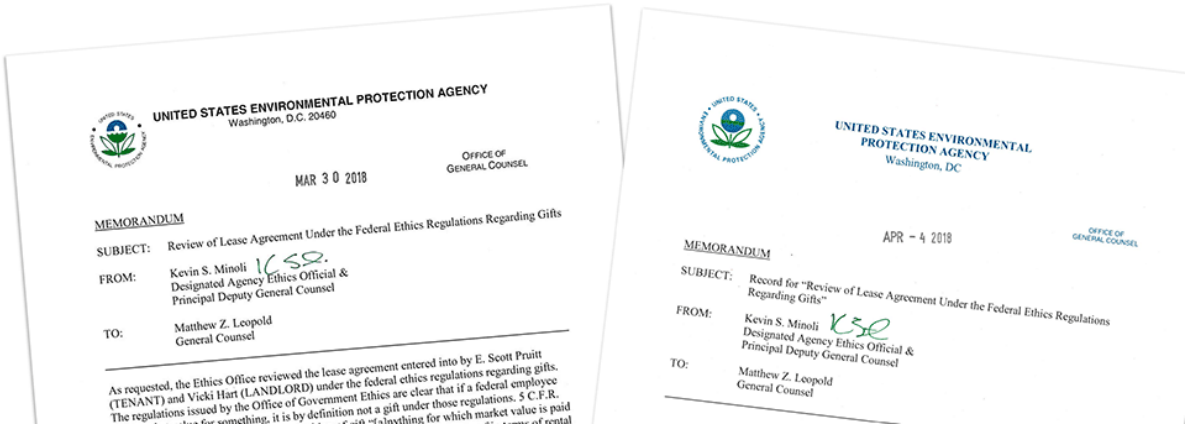
To be acceptable, a gift must satisfy *all* relevant restrictions.

Gift Ban “Exceptions”

There are common exceptions, which should be reviewed carefully:

- Customary exchanges of gifts with friends or relatives (how “customary” is the gift?)
- Anything for which the employee pays “market value”

Exercise care, and learn all the facts before making a determination.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF GENERAL COUNSEL

MAR 30 2018

MEMORANDUM

SUBJECT: Review of Lease Agreement Under the Federal Ethics Regulations Regarding Gifts

FROM: Kevin S. Minoli
Designated Agency Ethics Official &
Principal Deputy General Counsel

TO: Matthew Z. Leopold
General Counsel

As requested, the Ethics Office reviewed the lease agreement entered into by E. Scott Pruitt (TENANT) and Vicki Hart (LANDLORD) under the federal ethics regulations regarding gifts. The regulations issued by the Office of Government Ethics are clear that if a federal employee

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Educational Missions

Common exceptions to the Gift Ban include “educational materials and missions” and “[t]ravel expenses for a meeting to discuss State business.”

5 ILCS 430/10-15

Think carefully before approving out-of-state travel!

Revolving Door

Revolving door prohibitions are increasingly common

- See, e.g., 5 ILCS 430/15-45(f) (requiring that certain senior state agency employees receive prior approval before accepting non-State employment if they were personally and substantially involved in a regulatory or licensing decision affecting the potential employer); 220 ILCS 5/2-203 (restrictions on subsequent employment of ICC members)

For lawyers, other ethics restrictions also apply

- See, e.g., MPRC 1.11(requiring screening and no sharing in fees from matters in which the lawyer was personally and substantially involved)

Thank you